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SEP 28 1984
ALEXANDER L. STEVAS,
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No. 84-109

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ERNEST STICH and MIRIAM STICH,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION

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The government's memorandum fails to address the compelling and overriding reason why this Court should review this case: if this Court leaves unredressed the denial of the Stichs' basic right to a fair federal trial of their swine flu claim against the government, public confidence in the fairness and integrity of government-sponsored public health programs will be destroyed, and voluntary participation in such programs adversely affected.

Instead, echoing the flawed analysis of the court of appeals, the government jumps to the merits of the case in its effort to discourage review by this Court. The government's arguments only serve to bring into sharper focus the need for review.

1. The government is simply wrong in stating (Memorandum, p. 6) that the district court's decision to allow the surprise Whitley testimony and article — the key government evidence to support its HSE defense — was harmless error. The decision was prejudicial in the extreme: the district court relied on the Whitley evidence in making the pivotal finding that the Stichs had not met their burden of proving that Mrs. Stich had contracted post-vaccinal encephalitis, a disease, like GBS, compensable under the Swine Flu Act. *The district court found that evidentiary support for post-vaccinal encephalitis was insufficient "[w]hen compared with the strong support for viral encephalitis in general, and Herpes Simplex Encephalitis in particular. . . ."* (A 62) (emphasis added). Were it not for the Whitley HSE evidence, an entirely different evidentiary picture would have been presented, and the Stichs would have prevailed. Whitley himself admitted that, if HSE were excluded, *the next most likely diagnosis for Mrs. Stich was post-vaccinal encephalitis.*

For the same reason, the government is wrong in its myopic contention that Petitioners failed to show how the discovery abuses tainted the district court's ultimate finding that Mrs. Stich did not have a disease associated with the swine flu vaccine. (Memorandum, p. 6, n.4).

The government's interference with one of Petitioners' key witnesses (who would have testified that Mrs. Stich was not suffering from HSE) and its withholding of crucial epidemiological data drastically altered the constellation of trial evidence. It is therefore pure sophistry to suggest, as the government does here, that the abuses had no effect on the outcome of the trial.

2. Review by this Court is imperative to effectuate the mandate of Federal Rule of Civil Procedure 26(e) and to protect a litigant's right to cross-examination of an expert, as guaranteed by Federal Rule of Civil Procedure 26(b)(4). At trial, the court denied Petitioners' request to examine crucial epidemiological data underlying the Whitley article and/or to exclude Whitley from testifying. In reaching that determination, the trial court relied on Federal Rule of Evidence 403. As the court of appeals acknowledged, Rule 403 was the wrong legal standard to have applied to what was, in effect, a mid-trial discovery request necessitated by the government's failure to disclose Whitley's surprise change in testimony in flagrant violation of Rule 26(e). Nonetheless, the court of appeals excused the trial court's error and announced that the legal test under Federal Rule of Evidence 403 for exclusion of trial evidence otherwise relevant is the same as the test under Rule 26 for the discovery of facts underlying an expert opinion, even where such facts are crucial for the meaningful preparation of cross-examination. (A-8).

This ruling is not, as the government suggests (Memorandum, p.5), a routine matter unworthy of review. This ruling has grave implications: it eviscerates the mandate of Rule 26(e) and the right to prepare effective cross-examination of experts guaranteed in Rule 26(b)(4). The court of appeals underscored its error by incorrectly saying that the government did not conceal the Whitley article. (A-7). But concealment is not the test. By unfairly placing the burden of such a showing on the victims of the tainted evidence — the Stichs — rather

than on the errant party, the court drastically altered the procedural relations of the parties in federal trials in favor of the wrongdoer. Such a result can not be justified as an "exercise of discretion," and warrants review by this Court.

> "Rule 26(e) does not contain any specific sanction for failure to supplement discovery. Nevertheless, '[f]ew would question a court's inherent power to discipline breaches of [the rule], even in the absence of a court order.' *Discovery sanctions are commonly left to the discretion of the trial court, but as a reviewing court we are not prevented from stepping in where, as in this case, the exercise of that discretion effectively rewards the errant party and unwarrantedly prejudices his opposition.*" (emphasis added).

Labadie Coal Company v. Black, 672 F.2d 92, 95 (D.C. Cir. 1982).

Review by this Court is essential to ensure public confidence in the fairness and integrity of public health programs. Accordingly, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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